BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LISA A. TATE, Claimant, v. CITY OF BOISE, Self-Insured Employer, Defendant.	)	**IC 01-021042** **FINDINGS OF FACT CONCLUSION OF LAW AND RECOMMENDATION** Filed October 26, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above referenced matter to Referee Michael E. Powers. In lieu of a hearing, the parties submitted a stipulation of facts. Hugh Mossman of Boise represents Claimant. Alan R. Gardner, also of Boise, represents the City of Boise, a self-insured employer. The parties submitted post-hearing briefs. This matter came under advisement on September 10, 2004, and is now ready for decision.

ISSUE

By agreement of the parties, the sole issue to be decided is whether Idaho Code § 72-448 bars Claimant's claim for her medial epicondylitis.

CONTENTIONS OF THE PARTIES

Claimant contends that she gave timely notice of her work-related bilateral medial epicondylitis, and timely filed her claim and Complaint for that condition. Employer's Surety had been paying benefits for Claimant's prior work-related bilateral lateral epicondylitis as well as her medial epicondylitis that first manifested after Employer switched to self-insured status. Because her medical bills were being paid, she had no reason to report her medial epicondylitis

until she was taken off work and was entitled to temporary total disability benefits. In any event, Employer had actual knowledge of Claimant's bilateral medial epicondylitis and was not prejudiced by lack of timely notice, if indeed there was such.

Defendant contends that Claimant failed to timely report that her treatment had shifted from bilateral lateral epicondylitis to medial epicondylitis. Claimant was aware that Surety no longer insured Employer and she was obligated to give notice as soon as she was aware that her treatment shifted from the lateral to the medial area of her elbows. Claimant has not shown that Employer had actual knowledge of her medial epicondylitis or that it was not prejudiced by the lack of timely notice. Further, Claimant is both collaterally and judicially estopped from arguing that Employer's former Surety, the State Insurance Fund (SIF), paid any benefits for her medial epicondylitis due to language in a settlement agreement between Claimant and SIF indicating that SIF only paid benefits for the lateral epicondylitis, not medial epicondylitis. Finally, Claimant's argument that she did not need to give written notice of her claim because she was already receiving benefits from SIF is specious because there is no such contingency in Idaho Code § 72-448.

Claimant replies that to her " . . . it was all just elbow problems" and to require her to file a new claim because one accepted work-related elbow problem shifted from one area of her elbows to another is the type of technicality the legislature sought to avoid in enacting Idaho's workers' compensation law.

EVIDENCE CONSIDERED

The record in this matter consists of:

1. Exhibits A-I admitted by stipulation of the parties;

2. Supplemental Stipulation filed July 15, 2004, attaching a Notice Regarding Workers' Compensation Insurance dated November 11, 1998; and,

3. Supplemental Stipulation filed July 27, 2004, stipulating that no benefits have been paid by Employer as a self-insured for Claimant's bilateral medial epicondylitis.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant has been employed by the Boise City Zoo as a zookeeper since 1989. Part of her duties included hosing down primate cages and surrounding areas. The hoses were heavy and required repetitive back and forth motions to effectively aim the spray. Initially, Claimant hosed the cages two times a day; at least three to four hours in the mornings and another hour to an hour and a half in the afternoons.

2. In early 1995, Claimant's left elbow began to bother her. She saw W. Steven Rudd, M.D., an orthopedic surgeon, on January 23, 1995. He diagnosed extensor tendonitis of the left arm caused by her hosing activities.

3. In February 1996, Claimant began experiencing symptoms consistent with right lateral epicondylitis. Claimant was treated conservatively for her left lateral epicondylitis until February 9, 1999, when she underwent a Nirschel procedure on her left elbow. On January 10, 2000, Dr. Rudd declared Claimant medically stable regarding her bilateral lateral epicondylitis and assigned no permanent partial impairment.

4. On April 3, 2000, Dr. Rudd diagnosed work-related bilateral medial epicondylitis. He returned Claimant to work without restrictions but continued to treat her.

5. On October 9, 2001, Dr. Rudd took Claimant off work for two weeks.

6. On October 9, 2001, Claimant signed a "City of Boise Employee's Personal Injury Report" listing August 28, 2001, as the date of injury and the date Employer learned of the injury. She lists tendonitis in the lower part of her elbow as her injury. Exhibit G.

7. On October 29, 2001, SIF or its TPA filed a First Report of Injury or Illness (Form 1) with the Commission. Exhibit H. The Form 1 is undated but appears to be signed by Claimant. Claimant again lists August 28, 2001, as the date of injury and the date Employer was notified. She lists repetitive motion in hosing animal cages as being responsible for the tendonitis in her left and right elbows.

8. On March 21, 2002, Dr. Rudd wrote a letter to Claimant's counsel stating that Claimant's medial epicondylitis is a separate and different condition than the lateral epicondylitis for which Claimant received treatment in 1995 and 1996. Exhibit A, p. 43.

9. Claimant filed her Complaint with the Commission on September 24, 2002, listing the date of injury or manifestation of an occupational disease as October 9, 2001, and the date Employer was notified as August 28, 2001.

10. SIF last paid medical benefits on June 15, 2003. Exhibit I. Employer as self-insured has paid no benefits for Claimant's bilateral medial epicondylitis. *See,* Supplemental Stipulation filed July 27, 2004.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-448 provides in pertinent part:

> **Notice and limitations. –** (1) Unless **written notice** of the manifestation of an occupational disease is given to the employer **within sixty (60) days after its first manifestation**, or the industrial commission if the employer cannot be reasonably located within ninety (90) days after the first manifestation, and unless **claim** for worker's compensation benefits for an occupational disease is filed with the industrial commission **within one (1) year after the first manifestation**, all rights of the employee to worker's compensation due to the occupational disease **shall** be forever **barred**. Emphasis added.

Idaho Code § 72-102(18) provides: "Manifestation" means the time when an employee knows that he [*sic*] has an occupational disease, or whenever a qualified physician shall inform the injured worker that he [*sic*] has an occupational disease.

Idaho Code § 72-706 provides in pertinent part:

> **Limitation on time on application for hearing. –** (1) When **no compensation paid**. When a claim for compensation has been made and no compensation has been paid thereon, the Claimant has, **unless mislead to his** [*sic*] **prejudice by employer or surety**, shall have **one (1) year** from the date of **making claim** within which to **make and file** with the commission an application requesting a hearing and an award under such claim.
>
> (2) When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have **five (5) years** from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to **make and file** with the commission an application requesting an hearing and an award under such claim.
>
> (6) Relief barred. In the event an application is not made and filed as in this section provided, relief on any such claim **shall be forever barred**. Emphasis added.

Notice:

11. There is some question regarding when Claimant became aware of her medial epicondylitis. Dr. Rudd's April 3, 2000, office note indicates that Claimant had developed mild bilateral medial epicondylitis. The note does not reveal whether Dr. Rudd discussed the nature of this condition with Claimant, whether he explained to her that medial epicondylitis is a separate and different condition than lateral epicondylitis, and whether he explained that the medial condition was work-related. Claimant testified in her November 3, 2003, deposition that she did not remember the April 3 visit. However, in response to one of Employer's counsel's questions wherein he stated that Claimant knew she had problems in the medial portion of her elbow as early as April 2000, Claimant did not deny that she had such knowledge. Assuming, *arguendo*, that Claimant knew her condition had "manifested" on April 3, 2000, she would have had until June 2, 2000, within which to provide written notice of her "new" condition to Employer. Claimant did not provide such notice until the injury report of October 10, 2001, well beyond the 60-day limit of Idaho Code § 72-448.

12. Claimant testified as follows regarding the circumstances surrounding her making the instant claim:

Q. (By Mr. Gardner): Well, let me just ask you this: You've got at least visits in April, July, November of 2000. Did you ever fill out a report for the medial claim at that time?

A. I filled out the claim for the medial or the lower portion of my elbows when that became the main focus of my treatment and when Dr. Rudd was taking me off work for that.

. . .

Q. (By Mr. Gardner): Sometime in – I don't remember the exact date then. In August of 2001, you turn in the claim of August, 2001. But I think you actually filled in October, two years ago. What prompted you to actually make a claim at that time?

A. Well, I had to be off work for two weeks. And the main focus of my treatment at that time was no longer the upper portion of my elbow, but the lower portion of my elbow.

. . .

Q. (By Mr. Gardner): Why did you decide to do something at that time and not before?

A. Well, before, I didn't even know the City was self-insured[1] and all my claims were just going through the State Insurance Fund. And I didn't think there was any kind of a problem or difference. And the main focus of my treatment had been the upper part of my elbows. And the State Insurance Fund had continued to pay that. I mean, I hadn't had any problems.

Q. What were you made aware of there in August of '01 by – Did you discover then that it was the self insured program; is that why you filed this in 2001?

A. No. It was just the focus of my treatment became the lower portion of my elbows instead of the upper portion of my elbows.

Claimant's Deposition, pp. 78, 94-95.

13. Dr. Rudd's records do not support Claimant's contention that it was not until she was taken off work in October of 2001 that the focus of her treatment shifted from the lateral to medial portions of her elbow. As previously mentioned, Dr. Rudd began treating Claimant for medial epicondylitis as early as April of 2000. Dr. Rudd's office note of July 24, 2000,

[1] Employer argues that Claimant should have known Employer became self-insured on November 10, 1998, because a notice of the change in coverage was posted at her workplace. However, all the notice indicates is that Employer " . . . has complied with the law as to securing the payment of compensation to employees and their dependents in accordance with the provisions of the workers' compensation law." The notice names Intermountain Claims as Employer's Authorized Agent and Claim forms will be furnished by Employer, **by the surety**, or the Industrial Commission. The notice in no way indicates whether Employer is insured or self-insured.

indicates, "She is involved [*sic*] now into having bilateral medial humeral epicondylitis that is symmetric." Exhibit A, p. 10. Dr. Rudd's office note of November 13, 2000, indicates, "She developed more medial epicondylitis here in the last three to six months. Both elbows are hurting her on the medial side." *Id*., p. 11.

Idaho Code § 72-704 provides:

> **Sufficiency of notice – Knowledge of employer. –** A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, **nature** or cause of the injury, or disease, **or otherwise**, unless it is **shown by the employer** that he was **in fact prejudiced** thereby. **Want of notice** or **delay** in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his [*sic*] agent or representative **had knowledge** of the injury or occupational disease or that **employer has not been prejudiced** by such delay or want of notice. Emphasis added.

Oral notice may provide an employer with actual knowledge thus obviating the need for written notice:

> The referee and Commission did find that Murray-Donahue gave no proper *notice* under I.C. § 72-701. Nevertheless, there may be circumstances where an employer has considerable *knowledge* of an accident or injury without having received a formal written *notice*. The employer may have witnessed the accident, or otherwise been apprised of an injury. No formal notice is required in such circumstances under I.C. § 72-704.

Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995). Emphasis in original.

A claimant bears the burden of proving lack of prejudice. *Id*.

14. Claimant argues that Employer had actual notice of Claimant's bilateral medial epicondylitis because Claimant kept her supervisors informed of her medial epicondylitis and because she gave them "Preliminary Reports" from Dr. Rudd. A "Preliminary Report" dated July 24, 2000, lists "Bilateral medial humeral epicondylitis, L lateral epicondylitis" as Dr. Rudd's diagnosis. It further states: "Continued symptoms warrant continued follow-up."

Exhibit A, p. 20. A "Preliminary Report" dated November 13, 2000, lists "Bilateral medial epicondylitis of the elbows" as Dr. Rudd's diagnosis and Claimant was to return in one month. Exhibit A, p. 19.

Claimant testified as follows regarding what she told her supervisor:

> Q. (By Mr. Gardner): How about in 2000 when you had the medial problem or the lower problem coming up again, did you discuss that with the same people, or different people?
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> A. It would have been the same people. David Wayne left the zoo – I don't remember exactly when. But Greg Callahan has always been my immediate supervisor.
>
> Q. What did you tell them there in 2000?
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> A. I don't remember exactly. But I'd always furnish him with whatever visit from Dr. Rudd, I would give him the – Dr. Rudd always filled out a State Insurance Fund form. And I would always give that copy of that to him. And then we might have some general discussion about, how are you doing, or sometimes he would ask me, we'd like you to maybe work in this section, but we don't know because of your elbows. In fact, we opened a new penguin pavilion. And I would normally work in there, because they're a bird. But because of the amount of hosing that was done and the concern for my elbows, they didn't have me go to work in that section.
>
> . . .
>
> Q. (By Mr. Gardner): When was the first time you ever told him you thought you had a new problem?
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> A. I don't recall. I mean, when he would ask me about my elbows. Sometimes people could see me, and without realizing it, you'd be rubbing your elbows. And somebody would ask me about it. And I would say, it hurts here or there.
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> Q. Do you have a recollection of really making it clear to anybody out there that you had a new problem with the lower part of your elbow?
>
> A. To me, **it was all just elbow problems**.

Claimant's deposition, pp. 93-94, 96. Emphasis added.

15. The first definitive mention in the medical records of Claimant's medial epicondylitis as being a "new" condition is found in a March 21, 2002, letter from Dr. Rudd to Claimant's counsel. Claimant could not have been expected to know that the shift in location of her symptoms constituted a new condition for which a new claim needed to be submitted. To

her, it was "all just elbow problems." Her medical bills were being paid. Her employer was aware of her elbow problems regardless of the exact location of her symptoms. They accommodated her. It was not until she was taken off work in October of 2001 that she thought to file a new claim as she was now entitled to income benefits. Even so, there is no evidence that Dr. Rudd, or anyone else, informed her that the shift in the location of her elbow symptoms constituted a new and different condition from that for which she had previously been treated. In any event, Claimant was aware that her "elbow problems" were caused by her work and her treating physician agrees. Under the liberal construction to be given to the workers' compensation law to find coverage, it cannot be expected of a claimant in circumstances such as are presented here to do more than Claimant did. The Referee finds that under the rather unique facts presented here, Claimant provided Employer with timely notice when she filed her claim in October 2001. Thus, her Complaint filed on September 24, 2002, was also timely. Even if timely notice was not found to have been given, the Referee finds that Employer had considerable actual knowledge of Claimant's bilateral medial epicondylitis since at least July of 2000 when, according to her testimony, she provided her supervisor with Dr. Rudd's "Preliminary Report" dated July 24, 2000, listing medial epicondylitis as his diagnosis. Her testimony in that regard is unrebutted.

Prejudice:

16. Even if timely notice was not found to have been given, Claimant has proven that Employer was not prejudiced thereby. Employer argues that had timely notice been given, Employer and SIF could have investigated, conferred, and allocated responsibility before SIF made any payments for the medial problem. However, SIF was in a better position than Claimant to determine coverage of the medial problem and she should not be denied benefits because SIF did not communicate with Employer.

SIF was getting Dr. Rudd's preliminary reports and, presumably his records, and were informed that his treatment had shifted focus. Furthermore, Employer and SIF are presently not prevented from allocating responsibility and payment; Claimant's treatment would have been no different in any event.

17. The above findings were made without considering Claimant's argument that SIF's ongoing medical payment constituted a waiver of Employer's right to timely notice and filing and Employer's argument that Claimant should be collaterally or judicially estopped from asserting the same based on language in a lump sum agreement between SIF and Claimant. Therefore, the parties' arguments in that regard will not be addressed except to note the Referee cannot ignore SIF's "Medical Breakdown" that was admitted by stipulation and clearly shows SIF was making payments for the treatment of Claimant's medial epicondylitis until June 15, 2003. Such is considered merely to corroborate Claimant's testimony regarding one reason why she did not give notice sooner than she did, that is, that her bills were being paid so she did not think she had to take any action until she was taken off work.

CONCLUSION OF LAW

1. Claimant has complied with the requirements of Idaho Code § 72-448 and her claim for benefits for her bilateral medial epicondylitis is not barred.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this __18th __ day of ___October___, 2004.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __26th __ day of __October__, 2004, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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__/s/_____

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